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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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This petition is filed on behalf of Western Energy Supply and Transmission Associates, intervenor in No. 74-2063 below, a trade association of twenty two major public and private utilities operating in eleven Western States; and individually on behalf of Arizona Electric Power Cooperative, Inc., Arizona Public Service Company, Nevada Power Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company, all of which are electrical utilities which were petitioners in No. 75-1764 below; and

on behalf of Utah International, Inc., a coal mining company which was a petitioner in No. 75-1372 below.[1]

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.

## OPINION BELOW

The Opinion of the Court of Appeals has not yet been published in the official reports, but it has been published at 9 E.R.C. 1129.[2]

## JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Clean Air Act authorizes the Administrator of the Environmental Protection Agency to adopt

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[1] Insofar as petitioners can determine, the parties to the consolidated proceedings below that will be adverse respondents to the petition are the United States Environmental Protection Agency, its Administrator (Russell E. Train), Sierra Club, the Washington Metropolitan Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, Oregon Environmental Council, Sally Rodgers, John Tanton, Susan L. Moore, Stephen Winter, and the States of New Mexico and Nevada. The remaining interested parties below are automatically respondents to this petition, pursuant to this Court's Rule 21(4), but, insofar as petitioners know, they will not be adverse to this petition. Those Rule 21(4) respondents are listed in Appendix E hereto. Two members of Western Energy Supply and Transmission Associates, Utah Power and Light Company and Public Service Company of Colorado, have filed a separate petition, rather than joining in this petition; and Pacific Power and Light Company joined in the petition of Montana Power Company, *et al.*, No. 76-529.

[2] The opinion, which exceeds 50 printed pages in length, and formal judgment are reproduced in full as Appendices A and C to the petition of Montana Power Company, *et al.*, No. 76-529. Because of their volume, they are not reproduced herein.

regulations which grant to Federal Land Managers and Indian Governing Bodies power to control reclassification of lands.

2. Whether the issue of unlawful grant of authority over air quality to Federal Land Managers and Indian Governing Bodies is ripe for review.[3]

## CONSTITUTION, STATUTE AND REGULATIONS INVOLVED

The regulations being reviewed, 40 C.F.R. §§ 52.01 (d), (f), and 52.21 (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975), are set forth in Appendix A hereto. The relevant provisions of the Constitution and of the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are set forth respectively in Appendices C and B hereto.

## STATEMENT OF THE CASE

This case involves review of regulations promulgated by Respondent Environmental Protection Agency (EPA) on November 27, 1974. 39 Fed Reg. 42509, *et seq.* (Dec. 5, 1974). The regulations have been generically referred to as the "significant deterioration regulations".

The regulations were promulgated as a result of an order of the United States District Court for the District of Columbia entered on May 30, 1972, in the case of *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D. D.C. 1972). A panel of the Court of Appeals for the District of Columbia Circuit affirmed, per curiam, *Sierra Club v. Ruckelshaus*, 4 E.R.C. 1815 (D.C. Cir. 1972), and this Court affirmed without opinion by an equally divided Court. *Fri v. Sierra Club*, 412 U.S. 541 (1973).

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[3] The petition of Montana Power Company, *et al.*, presents a number of questions for review. Petitioners here concur in both the delineation of questions presented and reasons presented therein for the granting of a Writ of Certiorari. The two questions presented in the instant petition are similar to the questions enumerated as Question 2(d) in the petition of Montana Power Company, at 3, but which were not discussed therein.

The only written opinion, that of District Court Judge Pratt, ordered EPA to disapprove all state implementation plans which did not provide for the prevention of significant deterioration of existing air quality where that air quality was better than that required by the national secondary standards. The order further required EPA to promulgate regulations to prevent significant deterioration.

In response to that order EPA disapproved the implementation plans of all States insofar as they did not provide for the prevention of significant deterioration (37 Fed. Reg. 23836 (Nov. 9, 1972)) and promulgated the regulations at issue here.[4]

Petitioners in this action were among those who sought judicial review of the regulations pursuant to § 307(b) (1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1). In all, fourteen petitions were filed in several Circuit Courts of Appeal and all petitions were eventually consolidated in the Court of Appeals for the District of Columbia Circuit. A panel of that Court rendered its decision on August 2, 1976, affirming the regulations.

The regulations set forth three classifications of all areas which already meet the federal primary and secondary standards for sulfur oxides and particulates. Classes I and II allow only sharply limited incremental increases in existing levels, while Class III is set at the level of the secondary standards. 40 C.F.R. § 52.21(c)(2). Class I is to be used for areas in which "practically any change in the air quality would be considered significant"; Class II is for areas where significant would be more than that "normally accompanying moderate well-controlled growth"; and Class III would allow "deterioration of air quality up to the national stan-

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[4] The text of the regulations within 39 Fed. Reg. 42509 (Dec. 5, 1974), *as amended*, 40 Fed. Reg. 2802 (Jan. 16, 1975), 40 Fed. Reg. 25004 (June 12, 1975), and 40 Fed. Reg. 42011 (Sept. 10, 1975), and pertinent portions of the preamble to the December 5, 1974 promulgation are reproduced in Appendix A.

dards". 39 Fed. Reg. 42510. All areas are initially designated as Class II. 40 C.F.R. § 52.21(c)(3)(1).

The most pertinent portions of the regulations for purposes of this petition are the provisions for reclassification. The regulations grant to the States the power to reclassify areas within the State, including all federal lands within their borders, provided that the States have followed certain specified procedures and have taken into account certain specified considerations. 40 C.F.R. §§ 52.21(c)(3)(ii) and (iii). They then provide in § 52.21(c)(3)(iv) that "Federal Land Managers" and "Indian Governing Bodies" may reclassify lands within their respective jurisdictions, provided only that they follow equivalent procedures, take into account the same considerations, and consult with the affected States.[5] Federal Land Managers can reclassify federal lands only to a more restrictive class. The Administrator of EPA has no discretion to disapprove any proposed reclassification unless he determines that the proposer has arbitrarily and capriciously disregarded the specific substantive considerations or failed to comply with the designated procedures. 40 C.F.R. § 52.21(c)(3)(vi).

## REASONS FOR GRANTING THE WRIT

### I. THE CLEAN AIR ACT DOES NOT AUTHORIZE THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY TO ADOPT REGULATIONS WHICH GRANT TO FEDERAL LAND MANAGERS AND INDIAN GOVERNING BODIES POWER TO CONTROL RECLASSIFICATION OF LANDS

[5] It should be noted that private persons or businesses may not propose reclassifications; nor are there any procedures for forcing a State, Federal Land Manager or Indian Governing Body to propose reclassifications.

### A. The Clean Air Act Mandates State Control of Air Quality Within the Entire Geographic Area of the State, Subject Only to EPA Supervision

The Clean Air Act expressly grants primary responsibility over air quality to the States. Section 101(a)(3) provides "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments". 42 U.S.C. § 1857(a)(3). Section 107(a) provides:

> *Each State* shall have the primary responsibility for assuring air quality *within the entire geographic area comprising such State* by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State. 42 U.S.C. § 1857c-2(a) (Emphasis added).

The Act is clear that once the Environmental Protection Agency has prescribed the national standards to be achieved and maintained, it is for the States to develop and implement plans for meeting the standards. In addition, § 116 of the Act [42 U.S.C. § 1857d-1] specifically reserves to each State the right to impose stricter controls than are required by federal law.

The legislative intent to vest each State with control over air quality within the entire geographic area comprising that State is also manifested by § 118 of the Act, which, provides that all government agencies and departments with jurisdiction over any property, "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements". 42 U.S.C. § 1857f.

This statutory scheme has been recognized in several cases considering the Clean Air Act. In *Duquesne Light Co. v. EPA*, 481 F.2d 1, 3 (3d Cir. 1973), for example, the Court

agreed that the Clean Air Act granted control over air quality planning to the States, subject to EPA's supervision.

> In enacting the Clean Air Act Amendments of 1970, Congress attempted to foster a symbiosis between two perceived needs. First, Congress wanted to preserve the basic state and local control of the design and enforcement of air pollution regulations. . . . Second, . . . there was a desire for federal standards and enforcement. . . .
>
> The result of these two conflicting strains was that Congress in the 1970 Amendments, devised a system in which certain aspects of the pollution control effort were assigned exclusively to the EPA, other aspects being entrusted to the states under federal supervision.

In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, __, 95 S. Ct. 1470, 1474 (1975), Mr. Justice Rehnquist made the following observation with respect to the 1970 Amendments to the Clean Air Act:

> These Amendments sharply increased federal authority and responsibility in the continuing efforts to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle that, 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .' § 107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. § 1857c-2(a).

*See also Washington v. General Motors Corporation*, 406 U.S. 109, 114-16 (1972).

In summary, the Clean Air Act, by its explicit language and as judicially construed, mandates that each State shall control air quality within its own entire geographic area, subject only to supervision by EPA.

B. The Regulations Contravene the Mandate of the Clean Air Act that Each State Shall Control Air Quality Within Its Own Entire Geographic Area by Allowing

Reclassification of Areas Within a State Independently of Control by that State.

The EPA regulations at issue contravene the express mandate of State control by granting to Indian Governing Bodies and Federal Land Managers the authority over air quality on federal and Indian lands, as well as large areas of State and private land. The regulations thus unlawfully derogate from the primary responsibility and authority of the States under the Act to assure air quality of all lands within their geographic boundaries.

There is no language in the Act which, either expressly or by implication, allows the special treatment of federal and Indian lands within a State. But, in withdrawing reclassification of lands from State control, these regulations affect not only those federal and Indian lands themselves, but neighboring State and private lands as well. This is because the construction or modification of a source covered by the regulations will not be permitted if the effect of that source on air quality concentrations will cause a violation either of the air quality increments applicable in the immediate area *or the increments applicable in any other areas.* 40 C.F.R. § 52.21(d) (2) (i). EPA itself has emphasized the dramatic effect of this provision:

> Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for $SO_2$ could under some conditions violate the Class I increment for $SO_2$ 60 or more miles away. . . . Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. . . . [I]t should be clear

> that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. 39 Fed. Reg. 42512 (Dec. 5, 1974).

EPA acknowledged that this "drift factor" could limit growth outside a Class I area as much as 60 to 100 miles. *Id.* at 42513. The reclassification of federal or Indian lands can dictate growth and development on adjacent State and private lands for many miles around.

By allowing federal and Indian lands to be reclassified independently of State control, the regulations treat those lands differently from all other lands in the States and grant to Federal Land Managers and Indian Governing Bodies a decision-making power equal to that of the States themselves. Insofar as the prevention of significant deterioration is concerned, there is nothing inherent in the nature of air quality above federal or Indian lands which per se should remove its protection from State control. Indeed, as noted earlier, with regard to federal lands and entities, § 118 explicitly provides that they shall be subject to the same State and other requirements as other persons within the State. Similarly, with regard to Indian lands and entities, it is well settled that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary...." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). Since the Clean Air Act contains no special provisions for Indian tribes, they are subject to all the provisions thereof, including those granting the States the responsibility and authority, subject to EPA's supervision, for implementing the Act within their borders.[6] In short, by granting Federal Land Managers

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[6] Several petitioners below argued that the regulations in question violated rights of due process under the United States Constitution. The allocation of the responsibility for reclassification of Indian lands by In-

[Continued]

and Indian Governing Bodies a separate decision-making power from that of the States, EPA has purported to grant authority which the Act does not give it to grant. It has also attempted to confer that authority on political entities whom the Act did not intend should have such authority.

The power granted federal agencies and Indian Governing Bodies creates particularly severe problems in the eleven Western States served by petitioners because of the extensive amounts of federal and Indian lands and the checkerboard land ownership patterns in those States.[7]

The petitioner which intervened in No. 74-2063 and petitioners in No. 75-1764 below are all charged with providing essential electric service to consumers in the West; and, in order to carry out their mandates, must continue to construct and operate fossil fuel steam electric plants. The petitioner which petitioned in No. 75-1372 below is engaged in mining coal, on and off Indian reservations, for use in such plants and, prospectively, for manufacture on-site into

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dian Governing Bodies and the "reach" of such reclassifications beyond the Indian land borders is an example of such a denial of due process rights. While petitioners could seek judicial review of a Federal Land Manager's actions or that of a State in federal or State courts, respectively, there is no judicial forum in which to review the Indian Governing Body action. Judicial review of the actions of Indian tribes under these regulations would only be available in the narrow sense of seeking review of EPA's approval of any reclassification.

[7] The statistics regarding ownership of land in two representative Western States, New Mexico and Arizona, are as follows:

| | New Mexico* Percent of Ownership | Arizona** Percent of Ownership |
|---|---|---|
| Federal | 33.3 | 44.5 |
| State | 11.8 | 13.2 |
| Private | 45.5 | 15.3 |
| Indian | 9.3 | 27.0 |

* Source: Federation of Rocky Mountain States.

** Source: Map of Federal Lands, United States Geological Survey Map, 1968, Sheet No. 272.

synthetic natural gas. The existing and prospective plants produce emissions subject to limitation and are themselves subject to preconstruction review under the regulations. In view of the checkerboard mixture of federal, State, private and Indian lands in the Western States, the effectuation into regulation of the primary role of the States, as envisaged and mandated by the Clean Air Act, is crucial.

For example, in the Four Corners Area of Arizona, Utah, Colorado and New Mexico there are located electric generating plants owned wholly and partly by some of the intervenor and petitioner utilities in Nos. 74-2063 and 75-1747 below and coal mining operations of the petitioner in No. 75-1372 below for fuel for some of these plants and, prospectively, for synthetic fuel conversion. Within 60 to 100 miles of the existing and proposed plants within the New Mexico portion of the Four Corners region, there are four Indian reservations, two national monuments, three national forests, thousands of acres of federal public domain, as well as three other States.[8] The delegated authority to New Mexico to reclassify becomes of little value under these circumstances, since one of the considerations is the effects of the proposed redesignations on adjoining areas which include differing Indian Governing Bodies and differing Federal Land Managers, each having the power of reclassification. A protest by any one of the multiple Federal Land Managers or Indian Governing Bodies limits the circumstances under which EPA can approve the reclassification. Moreover, each can initiate its own reclassification, though the federal agencies only to a more restrictive class. This hodgepodge of conflicting "sover-

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[8] According to the Energy Committee of the New Mexico Legislature 1976, a "recent study on the northwest coal fields in New Mexico conducted by the State Geologist showed that coal ownership was 57.3 percent federal, 32 percent Indian, 5.9 percent private and 4.8 percent state".

eigns", utterly ignoring the primary role for the State in which the sources are geographically situated, creates a maze of potential vetoes for energy development that inhibits, if not curtails, petitioners' plans to meet the near and long-term energy crisis.

Because the vast majority of State and private land in the Western States lies within 60 miles of federal or Indian land, the classification of federal and Indian lands as Class I or even Class II in effect grants to entities other than the States air quality and land use control over most — and in some States all — of the lands within those States, regardless of ownership. The regulations at issue abrogate Congress' grant to the States of the primary responsibility and authority to assure air quality and to make land use decisions within their own borders. At least to the extent of that abrogation, the regulations are inconsistent with the Clean Air Act and exceed the authority granted to EPA by the Act.

## II. THE ISSUE OF UNLAWFUL GRANT OF AUTHORITY OVER AIR QUALITY TO FEDERAL LAND MANAGERS AND INDIAN GOVERNING BODIES IS RIPE FOR REVIEW

### A. The Circuit Court Decision Creates a Conflict Among the Circuits on the Issue of Exclusivity of Review Under the Clean Air Act

An important reason for granting the writ is to resolve a conflict among the Circuits resulting from the decision of the Circuit Court for the District of Columbia that the issue of unlawful grant of authority over air quality within a State to Indian Governing Bodies and Federal Land Managers was not ripe for review. 9 E.R.C. 1129, 1147-48. By its "deferral of this question until it arises in a more concrete context" (9 E.R.C. 1148), the Court holds that petitioners would have the right to litigate the issue in some court at a

later time.[9] That view is directly contrary to decisions of the Circuit Courts of Appeal for the Third, Seventh, Ninth and Tenth Circuits, as well as numerous Federal District Courts, all of which stand for the proposition that a § 307 (b) (1) [42 U.S.C. § 1857h-5 (b) (1)] action is the *exclusive* method of review of EPA promulgations such as the implementation plan under review in this case. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973); *Plan for Arcadia, Inc. v. Anita Associates*, 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Utah Internat'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973); *Anaconda Company v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973); *Pinkney v. Ohio Environmental Protection Agency*, 375 F. Supp. 305, 309 (N.D. Ohio 1974); *Arizona Public Service Company v. Fri*, 5 E.R.C. 1878 (D. Ariz. 1973); *Hagedorn v. Union Carbide Corporation*, 363 F. Supp. 1061, 1068 (N.D. W.Va. 1973); *Delaware Cit. For Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040, 1046 (D. Del. 1973), *aff'd* 510 F.2d 969 (3d Cir. 1975).

In this case the regulations being challenged were promulgated under § 110c-5(c) [42 U.S.C. § 1857c-5(c)], as identical implementation plans for each State to prevent significant deterioration of air quality. The cases cited above hold that a challenge to a promulgation under § 110c-5 must be brought in the United States Court of Appeals for the appropriate Circuit within 30 days of the promulgation. § 307 (b) (1). In *Getty Oil Company (Eastern Operations) v. Ruckelshaus, supra*, the Court said:

> If Congress specifically designates a forum for judicial review of administrative action, such forum is exclusive,

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[9] "The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Getty Oil Company (Eastern Operations) v. Ruckelshaus, supra*, 467 F.2d at 356.

> and this result does not depend on the use of the word 'exclusive' in the statute providing for a forum for judicial review. 467 F.2d at 356.

The holding of the Court below thus squarely conflicts with holdings in the other Circuits which have dealt with the question. The issue to be resolved is extremely important, going as it does to the question of where and how review of certain major EPA promulgations may be brought.

### B. Where Congress Has Provided an Exclusive Statutory Method of Review of an Agency Regulation Within a Limited Time After Promulgation, No Additional Showing of Ripeness is Required to Obtain Review of the Regulation

Under the view prevailing in other Circuits, petitioners' challenge to the regulations at issue must be in this action. Under that view, no additional showing of ripeness is necessary.

Subject to constitutional constraints, Congress may legislate as to court jurisdiction and procedure. As long as the Article III "case or controversy" requirement is recognized, Congress may allocate judicial resources and timing of judicial review by statutorily providing that judicial access standards such as standing and ripeness are to be considered met in certain classes of cases even though, in the absence of such a statute the courts might not consider them satisfied. *Warth v. Seldin*, 422 U.S. 490, __, 95 S. Ct. 2197, 2206 (1975) (dictum on standing); *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972); compare *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937), with *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 288-89 (1928); *cf. Natural Res. Def. Coun., Inc. v. EPA*, 481 F.2d 116, 120-21 (10th Cir. 1973).

The traditional rationale for the ripeness doctrine has been to prevent courts from becoming entangled in abstract

disagreements over administrative policy and to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The review procedure provided in the Act is not antithetical to that rationale. As to the first aspect of the rationale, the issue here presented is purely legal — does EPA have the right under the Act to delegate decision making to Indian Governing Bodies and Federal Land Managers? That legal issue will never become less "abstract" than it presently is. As to the second aspect of the rationale, there is no dispute that the Agency action is final and that its review is proper under § 307 (b) (1). Nor can there be any doubt that consideration of the issues raised would not constitute improper judicial interference with an administrative decision. Because of the widespread ramifications of major EPA promulgations under the Clean Air Act and the public interest in prompt resolution of any questions as to their validity, Congress explicitly provided that judicial review of such Agency action must be initiated within 30 days after promulgation.[10] By specifically providing the early "judicial interference", Congress plainly determined that the necessity for prompt review of major EPA promulgations[11] satisfied the considerations underlying both branches of the ripeness doctrine rationale.

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[10] If a petition is based solely on grounds arising after the 30th day, it may be filed after the 30th day. § 307 (b) (1). The question of whether EPA has legal authority under the Act to grant powers to Indian and federal agencies is a ground which existed upon promulgation of the regulations.

[11] Direct review in the Circuit Courts is only permitted for major final promulgations such as national air quality standards and actions concerning state implementation plans. *See* § 307 (b) (1). Traditional statutory or common law relief against a state or the Administrator is recognized in § 304 (e); and enforcement in District Courts of emission standards and required Agency action is provided for in § 304 (a).

The unlawful grant of authority to Indian Governing Bodies and Federal Land Managers has created a potential veto power over energy development, especially in the Western States served by petitioners. The very existence of that veto power will have a chilling effect on planning, investment and development for meeting our energy needs. Planning for electric power plants and other energy facilities, including assurance of adequate fossil fuel supplies, cannot proceed properly pending resolution of the conflicting jurisdictions of the States, Indian tribes and various federal agencies under the regulations. Petitioners cannot risk spending millions of dollars on planning and preparing a plant site only to have the site (or its fuel source) eliminated by a purported reclassification by an Indian tribe or manager of federal land 60 to 100 miles distant from the site.[12] Whether such Indian or federal bodies have such veto authority is seriously in doubt. It is that kind of doubt Congress sought to minimize by, in effect, inferring ripeness of purely legal questions which go directly to the underlying validity of a final regulation and providing for review in Circuit Courts within 30 days of promulgation.

In terms of reviewability under § 307 (b) (1), there is no difference between all of the other issues decided by the Circuit Court and the issues raised by this petition. They are all ripe under the review procedure established by the Act.

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[12] A "Guidance Memorandum" on the regulations from the Assistant Administrator of EPA to all Regional Administrators dated September 28, 1976, reveals the pervasive impact of the federal and Indian authority. The Administrator directed that even where a governing body merely "announces consideration" of a possible reclassification, EPA approval of a *previously* filed application for a construction permit must be withheld pending (and depending upon) EPA action on the reclassification; and this is true even where the proposed source is not to be constructed within the political boundaries of the body considering reclassification. The full text of the Memorandum appears in 7 BNA Env. Rptr., No. 23, at 859 (Oct. 8, 1976), and is reproduced in pertinent part in Appendix D.

### C. The Issue of Unlawful Granting of Authority is Purely a Legal Issue Resolvable by Statutory Construction

Either the Act grants reclassification authority to Federal Land Managers and Indian Governing Bodies or it does not. That is purely a legal issue. No factual situation will properly assist in its resolution.

The Act, comprehensive and detailed in all other respects, says absolutely nothing of "Federal Land Managers" or "Indian Governing Bodies", but places the primary responsibility for prevention and control of air pollution with the States and local governments. *See, e.g.*, §§ 101 (a) (3) and 107 (a). Statutory interpretation provides the answer to the legal question of whether authority was properly removed from the States and delegated by the Agency to the Indian and federal entities.

Therefore, this case is unlike *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967), cited by the Circuit Court in support of its view on ripeness. 9 E.R.C. at 1147. Though purely legal (as here), the issue in *Toilet Goods* was not determinable by reference to the language of the law alone. This Court held there that evaluation of various problems in enforcement, supervision and administration were necessary to show "whether the statutory scheme as a whole justified promulgation of the regulation". 387 U.S. at 164. In the present case evaluation of the operation of the regulations might show whether they work well or poorly, but it cannot offer relevant assistance in interpreting the law.

The Circuit Court's avoidance of the issue was based upon its uncertainty of "how a conflict may evolve", and its speculation that EPA might someday approve a State plan which did not include the powers granted to the Indian and federal entities. 9 E.R.C. at 1148. But, it is legally unimportant how a conflict might evolve — the *power* to act has been fragmented and placed in the hands of two additional

classes of entities by final Agency action in violation of the law under which the Agency operates. It is the *threat* of exercise of that power, not its actual exercise, which already has and will continue to inhibit planning for future development. It is not a condition of ripeness that unlawfully delegated power necessarily be exercised before its legality may be challenged. *See Abbott Laboratories v. Gardner, supra.* Moreover, it is not helpful to a resolution of the issue to speculate about what a State plan may be like in the future. Petitioners' plans for energy development are inhibited now by the regulations which exist now. Review is required to determine whether these regulations are lawful. That is a legal determination, not properly or necessarily aided by waiting either for future operation of the regulations or for their possible future amendment.

## CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: October 29, 1976

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